

TRAVIS D. SETTLEMENT AGREEMENT: POTENTIAL CROSS SYSTEM IMPACTS AND IMPLICATIONS

A Report Prepared for the
Legislative Finance Committee

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June 10, 2004
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INTRODUCTION AND PURPOSE

At the March Legislative Finance Committee (LFC) meeting, the committee heard a report on the Developmental Disabilities (DD) System and a number of emerging issues occurring in that system and a report on Medicaid redesign. The settlement agreement of the court case commonly known as Travis D. was among the emerging issues discussed in the DD system report, and the issue of over-arching goals in the allocation of resources among entities was discussed as an issue related to Medicaid redesign. The purpose of this report is to inform the LFC of potential impacts the provisions Travis D. settlement may have on other disability service systems, and on eligibility for services and to review the over-arching policies recommended by the Governor's Health Care Advisory Council and adopted by the Department of Public Health and Human Services (DPHHS). The over-arching policies are interrelated to the cross system impacts of Travis D.

TRAVIS D. BACKGROUND

The Travis D. litigation was a class action lawsuit filed by the Montana Advocacy Program (MAP) in 1996 on behalf of individuals with developmental disabilities. The lawsuit sought to protect the civil rights of individuals with disabilities and the provision of appropriate community services for individuals with disabilities. The class of plaintiffs in this suit was individuals with developmental disabilities who are, have been, or will be residents of the Montana Developmental Center (MDC) or Eastern Montana Human Services Center (Eastmont) during a specified time period. The defendants in this litigation were the state of Montana, MDC, and various employees of the state.

On February 5, 2004 a court ordered settlement agreement of this litigation was signed. This settlement agreement contains a number of provisions specific to the DD system. Those provisions were discussed in the report "Developmental Disabilities Program: Emerging Issues and Status of Eastern Montana Human Services Center" dated March 10, 2004. In addition to the impact of the settlement agreement on the DD system, the settlement may potentially impact other disability systems.

LARGER IMPLICATIONS OF THE TRAVIS D. SETTLEMENT

Legislative legal counsel answered a number of legislative questions in a letter¹ dated April 19, 2004. The legal analysis highlights some potential issues and impacts of the Travis D. litigation settlement agreement that may apply broadly to the all disability service systems administered by DPHHS. The potential impacts may be²:

- Broader Medicaid eligibility criteria
- Mandate to provide certain optional Medicaid services
- Equal protection concerns

BROADER MEDICAID ELIGIBILITY CRITERIA

Section B.10.1.1 of the settlement agreement provides that the defendants will take all reasonable actions, legally and administratively feasible to maximize federal funding for community DD programs through efforts to assist persons not currently eligible for Medicaid to become eligible for Medicaid. It would seem that changing Medicaid eligibility criteria so that more developmentally disabled

¹ April 19, 2004 correspondence from Greg Petesch, Director of Legal Services, Legislative Services Division, to Representative Edith Clark. Attachment A.

² Ibid.

individuals qualify for the program could constitute a reasonable and administratively feasible action to achieve this goal.³ Any change to expand eligibility and increase the number of developmentally disabled individuals eligible for all Medicaid covered services would be applicable to other disabled individuals.

MANDATE TO PROVIDE CERTAIN OPTIONAL MEDICAID SERVICES

Section B.9.3.1 requires that DPHHS make mental health and dental care services available to the class of persons covered by the Travis D. settlement. These services are considered optional Medicaid services, meaning that federal rules allow a state to decide whether to offer such services as part of its Medicaid program. However, the settlement has made provision of those services mandatory for the covered class of persons.

This part of the settlement removes an aspect of administrative flexibility in DPHHS budget management and shifts the cost of providing services from the DD system appropriation to other disability systems. For example, DPHHS eliminated payment for outpatient Medicaid mental health services for adults unless they have a serious and disabling mental illness. The settlement will reinstate such services for the covered class of persons. Since the cost of mental health services is funded in the Addictive and Mental Disorders Division, this aspect of the settlement agreement shifts costs to another service system.⁴

EQUAL PROTECTION CONCERNS

Legislative legal counsel notes the Equal Protection Clause contained in section 1 of the 14th Amendment to the United States Constitution and the equal protection guarantee contained in Article II, section 4, of the Montana Constitution. These clauses “guarantee equality of treatment for similarly situated individuals”⁵ and are referenced regarding potential implications of the settlement agreement in provision of services both within the DD system and in provision of services in other disability service systems. Legislative legal counsel discusses the need for a rational basis establishing criteria for providing or denying services and comments that the rational basis for providing services to the group covered by the settlement agreement and denying those same services to developmentally disabled individuals who are not covered by the settlement agreement is difficult to discern.⁶ It also would seem that arguments based on equal protection provisions might apply in the provision of dental and mental health services, which the settlement agreement requires the department make available to class members through the Montana Medicaid program, and might also be extended to other institutional populations that desire community based services rather than institutional services. It is possible that such arguments might be used to influence the legislature to expand and/or equalize the provision of services within and among groups of individuals with varying disabilities or, on the other hand, to reduce services provided to certain classes of individuals.

OVER-ARCHING POLICIES

At the last LFC meeting, the committee heard a staff report about the lack of over-arching policies to guide the allocation of resources among competing entities and requested that the Governor’s Health Care Advisory Council (Council) consider over-arching policies. DPHHS staff indicated that it would

³ Petesch, p 3.

⁴ Medicaid dental services are funded by the Child and Adult Health Care Resources Division.

⁵ Petesch, pp. 3-4.

⁶ Ibid.

bring such language before the Council and a recommendation would be available for review at the June LFC meeting.

IMPORTANCE OF OVER-ARCHING POLICIES TO THE LFC

Statements that guide allocation of resources among entities are among the most important public policies considered by the legislature. Such statements are particularly important to the LFC because:

- The allocation of public funds is an extremely important expression of legislative policy
- Legislative enactment of such policies preserves the legislature's prerogative to establish public policy and guide state agency administration of public programs to achieve those policies and it also provides an opportunity to pre-empt or limit court action, which can limit legislative policy choices
- Legislative consideration of such policies provides a venue that allows citizen values to be considered and used to provide direction to Montana state government

IMPORTANCE OF OVER-ARCHING POLICY GUIDANCE IN DPHHS

Over-arching policy guidance in allocation of public funding for human services is very important because court actions have had major and direct influence on state administration of and funding levels for such services. Court actions can be brought due to the absence of well thought out policy guidelines. Although not necessarily based on equal protection arguments, recent examples of court decisions with administrative and fiscal impacts are the Travis D. settlement in Montana and the Olmstead decision by the United States Supreme Court. An historic example, the Butte Community Union lawsuit in Montana, led to greater general fund spending for general assistance and state medical assistance when the state first assumed responsibility for administration of all human services in 12 counties.

Policy statements that guide allocation of resources among entities may be particularly important to the equal protection issues raised in a legal review of the Travis D. settlement.⁷ Over-arching policies can provide the guidance to support allocation of resources. A rational basis supporting an action is the lowest level or most basic test of judicial review when cases of equal protection are brought before a court. Because court decisions can compel states to provide services, articulating policy statements to guide spending decisions can be a first line of defense in such cases.

Adoption of these guidelines can establish standards by which to exercise discretion granted to DPHHS.⁸ As noted in previous staff reports, no such guidelines exist to direct DPHHS in application of the authority delegated to it to manage appropriations established by the legislature. However, even with guidelines in place, persons may bring court actions to determine whether such guidelines were applied in a way to satisfy equal protection constitutional standards.

Issues for LFC Consideration

This section summarizes the issues and options for LFC consideration and each will be listed again at the conclusion of the report for LFC action. The options for consideration were introduced at this point in the report to allow readers to evaluate the issues and options as the Council recommendations and LFD staff observations are presented.

⁷ Ibid.

⁸ Greg Petesch, Chief of Legal Services Bureau, Legislative Services Division, personal communication, June 10, 2004.

The issues and options that are raised for LFC consideration are:

- 1) Does the LFC endorse the overarching policy guidelines articulated by the Council and agreed to by DPHHS?
 - a) If so, does the LFC wish to review the draft legislation being prepared to include the policy guidelines in statute for endorsement?
 - b) If not, does the LFC wish to review potential changes to or augmentation of the policy guidelines by:
 - a. Defining the terms used in the policy guidelines?
 - i. If so, does the LFC wish to request that:
 - a) LFD staff, in cooperation with legislative legal staff and DPHHS staff, propose definitions for selected terms for LFC review at its next meeting, or
 - b) Request that such definitions be considered as part of interim work by either the LFC, the Children, Families, Public Health and Human Services Interim Committee or a subcommittee of both committees?
 - c) Requesting that DPHHS “go back to the drawing board” and bring new language to the LFC for its review?

COUNCIL RECOMMENDATION

The Council held its last meeting May 11 and DPHHS received a final report (Redesign Report) dated June 2004. One of the Council recommendations, which is being implemented by DPHHS, is a statement of over-arching goals and policy. DPHHS will propose that the guidelines be included in statute. The Executive Summary of the final report summarizes the recommendation in this way:

RECOMMENDATION/ACTION#1: DEFINE FUNDAMENTAL VALUES, PRINCIPLES AND GOALS

The Council recommended and the department adopted a set of fundamental values that can serve to focus future consideration of policy changes around certain basic concepts. This set of values incorporates at least the following concepts:

- a) Gives priority to those most in need as defined by the combination of the severity of their economic, social and medical circumstance;
- b) Empowers individuals to assume increased responsibility for their health care;
- c) Recognizes the differences in populations served by the Medicaid program and the differences in availability of resources in various parts of the state;
- d) Insures that quality of care is of primary importance;
- e) Recognizes the importance of evidence based data in any decision making process;
- f) Recognizes the importance of effective communication among all parties involved in the Medicaid program, including users, providers, the general public and legislature; and
- g) Recognizes the explicit responsibility of the Department to be publicly accountable for the quality of care provided and the expenditure of public funds.⁹

⁹ Montana Department of Public Health and Human Services, “Montana Public Health Care Redesign Project”, June 2004, p. 6.

Meaning of Terms

Item a in Recommendation 1 is the statement that captures over-arching policy goals. Item 1a is important because it articulates the most basic policy statements to support expenditure of public funds to provide services that directly benefit an individual. Item 1a articulates values that would seem rationale to most persons in support of such a decision. As noted earlier, this policy guidance would provide more direction than is currently given to DPHHS.

However, the rub comes when the terms used in item 1a are defined. For instance, what one person may consider a severe economic need, another person may not. A good example would be the legislature's policy discussions in the last two sessions as to whether the statutory income eligibility for the Children's Health Insurance Program (CHIP) should be changed (either up or down) from 150 percent of the federal poverty level (FPL). Similarly, what one person may consider a severe disability may not appear to be severe or as severe to another person.

An expanded discussion of each recommendation is included in the body of the report. LFD staff studied the expanded discussion to determine how the terms used in the guiding principle were defined or how the principle might be applied. In one section of the discussion on Recommendation 1, the term "social" was defined as family status and the term "economic" is defined as income and assets.¹⁰ Other terms that are important in understanding the guideline are not defined, such as the meaning of severity of disability. The process as to how a combination of all factors might be used to determine spending decisions is not mentioned. In addition, there are no specific guidelines as to what income and asset tests might be applied or whether eligibility for all programs would use income and asset tests. A person would need to review, statutes, department rules, and potentially even specific documents retained by DPHHS in order to know which programs used what type of standards and in which programs family status was a determining factor.

Recommendation 1 is further explained by discussion of the following values: access, personal responsibility, accountability, diversity, and public participation. While the value "personal responsibility" matches item b in Recommendation 1 and the value "accountability" matches items 1e, 1f, and 1g, it is difficult to make a good match with the value "access" (or the other values) to item 1a.¹¹

If such terms are not defined, then the meaning of the terms and application of the guidelines will be delegated to DPHHS. If the Legislature wishes to establish certain criteria by which programs are administered it could consider doing so by more explicit guidance. The rational basis for spending changes would need to be determined by reviewing DPHHS application of the guideline.

Potential Legislation

The final "Redesign Report" lists the following action item for the over-arching goals and principles:

DEVELOP CODIFYING LEGISLATION

Recognizing the need to formally establish continuity in policy development and management procedures employed by the department and legislature, the department will seek an amendment to a

¹⁰ "Montana Public Health Care Redesign Project", p. 17.

¹¹ See Attachment A.

section of Title 53, Chapter 6, MCA during the 59th Legislative Session that will incorporate the following as fundamental core values and principles of the Montana Medicaid Program:

- a) When considering changes in policy or reduction in services, the department and legislature should first protect those most vulnerable and most in need as defined by the combination of the severity of their economic, social and medical circumstance.
- b) When considering changes in policy or reduction in services, preference should be given to elimination of an entire Medicaid program or service rather than sacrifice the quality of care for several programs or services through dilution of funding.
- c) When considering changes in policy or reduction in services, priority should be given to retaining those services that protect life, alleviate severe pain and prevent significant disability.¹²

ISSUES FOR LFC CONSIDERATION

DPHHS staff indicates that draft legislation is being prepared. There are several issues that the LFC may wish to consider with respect to the language proposed in the final report and whether it would endorse the language and also endorse the inclusion of such language in statute. Some of the options become moot depending on LFC action in the first option. For instance, if the LFC endorses the guidelines as written, it may not want to consider any other options or action. On the other hand, some options may be considered in tandem with each other. Finally, the LFC may wish to consider how to coordinate with the Children, Families, Public Health and Human Services Interim Committee, which will review any potential legislation proposed by DPHHS depending on the option(s) it selects.

1. Does the LFC wish to take a position regarding the overarching policy guidelines articulated by the Council and agreed to by DPHHS? If so, does the LFC want to:
 - a. Endorse the guidelines as written
 - b. Endorse the guidelines subject to some changes (see option 2)
 - c. Support inclusion of the guidelines in statute (as a subcomponent of either a or b)
 - d. Do not endorse the guidelines
 - e. Make no recommendation
2. Does the LFC wish to endorse the policy guidelines with some changes or augmentation by:
 - a. Defining the terms used in the policy guidelines? If so, what terms should be addressed?
 - b. Does the LFC wish to request that DPHHS include language specifying that allocation of resources that increase spending also be subject to the same over-arching policies?
 - c. What other changes would the LFC like to consider?
 - d. If endorsement of changes is the option chosen, does the LFC wish to request that:
 - i. LFD staff, in cooperation with legislative legal staff and DPHHS staff, propose definitions for selected terms for LFC review at its next meeting, or
 - ii. Request that such definitions be considered as part of interim work during the 2007 biennium by either the LFC, the Children, Families, Public Health and Human Services Interim Committee or a subcommittee of both committees?
3. Does the LFC wish to not endorse the guidelines and request that DPHHS “go back to the drawing board” and bring new language to the LFC for its review?
 - a. If so, what are core values the LFC would like to see incorporated

¹² “Montana Public Health Care Redesign Project”, p. 76.

- b. If so, does the LFC wish to request that:
 - i. LFD staff, in cooperation with legislative legal staff and DPHHS staff, propose definitions for selected terms for LFC review at its next meeting, or
 - ii. Request that such definitions be considered as part of interim work during the 2007 biennium by either the LFC, the Children, Families, Public Health and Human Services Interim Committee or a subcommittee of both committees?
- 4. Does the LFC wish to review the draft legislation being prepared to include the policy guidelines in statute for endorsement or other potential change?
 - a. Request draft bill for review at next LFC meeting
 - b. Request that DPHHS bring legislation forward without review
 - c. Take no position

BROAD DISCUSSION OF THE OPTIONS

The options listed for LFC consideration are not mutually exclusive. Therefore, options and timing implications of LFC decisions are discussed together.

If the LFC decides that the guiding principles are good as stated and chooses to forego review of draft legislation or if the LFC decides to make no recommendation, then no follow up is needed by the LFC. If the LFC makes a recommendation on whether such guidelines should or should not be included in statute, those are choices that can be made in conjunction with nearly all other options except non-endorsement of the guidelines with no further legislative action.

If the LFC decides that the guiding principles are good, but believes that some or all terms used in the principles need more specific definition it may wish to consider several approaches. The issues related to the guiding principles could be quite contentious, especially if more terms and processes within the principles are defined more specifically. Even if the debate were not contentious, public comment may be extensive.

The LFC would also need to decide how much administrative flexibility it would want to delegate to DPHHS in administration of the principles. Defining the terms used in the principle and processes that would be followed in determining the combination of factors would narrow DPHHS flexibility.

If the LFC opts to takes action(s) requiring further LFC involvement, it may wish to consider whether its planned meeting schedule and staff commitment could accommodate effective resolution of the issue.

The LFC may choose to take action(s) that moves the public consideration of and debate around the guiding principles to the upcoming legislature. It could consider directing various staffs to coordinate to propose initial changes for consideration, but not final action.

If the LFC believes that the staff and meeting time remaining in the interim is insufficient to address the issues related to specific definition of terms and to craft good solutions for legislative consideration, it could suggest that the topic be deferred for discussion during the 2005 biennium interim and recommendation for the 2007 legislature. The merits of more thorough review would need to be weighed against the potential for litigation that could impact the ability of the legislature (and DPHHS) to implement the principles.

If the LFC does not endorse the guiding principles and wants to consider different principles it has several options much like those already discussed and the issues related to timing would also apply. It can direct staff(s) to bring back other language for review at the next meeting. If that were the option chosen, it would be helpful for the LFC to suggest the values it would like to see incorporated in such language.

Finally, the LFC may wish to coordinate action that it takes with the Children, Families, Public Health and Human Services Interim Committee.

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